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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 297

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

VELJKO STANISIC

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the court of appeals (A. 61–75) is reported at 393 F. 2d 539.

JURISDICTION

The judgment of the court of appeals was entered on April 17, 1968 (A. 76). The petition for a writ of certiorari was filed on July 16, 1968, and was granted on October 21, 1968 (A. 77). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, when the procedures specified in Section 252(b) of the Immigration and Nationality Act for

the revocation of an alien crewman's conditional landing permit and for his deportation are initiated while his ship is still in a United States port, the government must abandon these proceedings once his ship has departed and must instead institute ordinary expulsion proceedings under Section 242 of the Act.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of Sections 242(b), 243(h), 252, and 254 of the Immigration and Nationality Act, and of Sections 251.1, 251.2, and 253.1(e) of Title 8 of the Code of Federal Regulations are set forth in the Appendix, *infra*, pp. 39–46.

STATEMENT

Respondent, Veljko Stanisic, is a 33-year-old native and citizen of Yugoslavia who arrived at Coos Bay, Oregon, on or about December 23, 1964, as a member of the crew of the Yugoslav *M/V Sumadija* (A. 10).[1] He entered the United States under the authority of a conditional landing permit, issued pursuant to Section 252(a)(1) of the Immigration and Nationality Act (8 U.S.C. 1282(a)(1), Appendix, *infra*, p. 41) authorizing him to go ashore while the ship was in port, but in no event for longer than 29 days (A. 5, 10, 62).[2] On January 4, 1965, following several landings under the permit, he went ashore for the

[1] Respondent was unmarried at the time (A. 10). The record does not reflect his present marital status.

[2] Such permits are known as "D–1" conditional landing permits from the paragraph number of the implementing regulation (8 C.F.R. 252.1(d)(1)).

last time (A. 10, 26, 62). On January 6, 1965, respondent appeared with a relative at the Portland, Oregon, office of the Immigration and Naturalization Service and informed an official that he wished to remain permanently in the United States because he would be subjected to persecution if he returned to his ship or to Yugoslavia (A. 5, 10). In the course of an interview, respondent expressly indicated that he would not return to his ship under any circumstances (A. 5). His conditional landing permit was thereupon revoked—pursuant to Section 252(b) of the Act (8 U.S.C. 1282(b), Appendix, *infra*, pp. 41–42)—and he was detained for removal to and deportation on his ship, which was still in port (A. 5, 7; see note 4, *infra*).

On the following day, January 7, 1965, the immigration authorities offered respondent an opportunity to make a sworn statement and to present evidence, under 8 C.F.R. 253.1(e) (Appendix, *infra*, p. 46), in support of his claim that he would be persecuted if he returned to Yugoslavia (A. 5). Under that regulation,[3] an alien crewman whose conditional landing permit has been revoked, and who claims that he cannot return to a Communist country because of fear of persecution on account of race, religion, or political opinion, may be temporarily paroled into the United States in the discretion of the District Director. Upon the advice of counsel, respondent refused to make a sworn statement or to offer any evidence, contending that he was entitled to have his claim considered, not

[3] It has since been redesignated 253.1(f) and amended in an immaterial detail (see p. 46 n. 3, *infra*).

as an application for parole under the regulation, but as a petition for a stay of deportation under Section 243(h) of the Act (8 U.S.C. 1253(h), Appendix; *infra*, p. 40) (A. 5–6, 62–63). That section—as it then read (see p. 6, *infra*)—authorized the Attorney General, in his discretion, to withhold the deportation of any alien within the United States to any country in which, in his opinion, the alien would be subject to "physical persecution." Respondent's counsel contended that the claim should be heard in accordance with the procedures prescribed by Section 242(b) of the Act (8 U.S.C. 1252(b), Appendix, *infra*, pp. 39–40), which include a hearing, with counsel, before a special inquiry officer (A. 63). On the same day, the District Director denied respondent's request for asylum for want of a supporting showing and ordered that he be returned to his ship for removal from the country pursuant to Section 252(b) (A. 5–6).

Respondent thereupon filed suit in the United States District Court for the District of Oregon to enjoin the District Director from deporting him (A. 3–4, 6–9). On January 18, 1965, the district court ruled that respondent was not entitled to a hearing before a special inquiry officer, but stayed the District Director's order, remanded the case to the immigration authorities to afford respondent a further opportunity to present evidence under 8 C.F.R. 253.1(e) in support of his plea for asylum, and retained jurisdiction (A. 9, 28, 63).

The District Director withdrew his prior order on the same day, pursuant to the district court's remand, and on January 19 and 20, the Deputy District Direc-

tor conducted an evidentiary hearing at which respondent testified and called witnesses (A. 10–18, 24, 28). On January 25, 1965, the District Director found that respondent had failed to prove his claim that he would be persecuted and denied the application for parole (A. 10–22). Respondent's ship had in the meantime sailed for a foreign port.[4]

On January 27, 1965, respondent, challenging the findings of the District Director, renewed his request for injunctive relief in the district court (A. 23–25). On July 20, 1965, the district court (East, D.J.) sustained the administrative action and dissolved the stay order (A. 26–34). The court found that the District Director's decision was fully supported by the

[4] The ship's sailing date does not appear from the record which was before the court of appeals. However, in an affidavit dated January 13, 1965, which the government filed in the district court on that date as an exhibit to a motion for summary judgment, the District Director attested that the ship had been at Coos Bay on January 6, when respondent's conditional landing permit was revoked; that it had thereafter proceeded coastwise; and that, according to the local agent for the vessel, it was scheduled to sail from Los Angeles, bound for Italy, on January 16. Through an apparent oversight, the motion for summary judgment and its attachment were not among the record papers certified by the clerk of the district court to the court of appeals. They were retained in the district court record in No. 65–9 Civil, *Vucinic* v. *Immigration and Naturalization Service*, a companion case to the present one, to which the materials were also pertinent. A copy of the District Director's affidavit (Exhibit 4 to the motion), together with a copy of a letter we have received from the clerk of the district court certifying the affidavit to be part of the district court record, is being lodged herewith.

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evidence and that there had been no abuse of discretion (A. 32). *Vucinic* [and *Stanisic*] v. *Immigration and Naturalization Service*, 243 F. Supp. 113, 117 (D. Ore.)

Respondent took no appeal from that order. Instead, in July 1965, he petitioned Congress for relief by private bill (A. 63). In accordance with its practice in such circumstances, the Service stayed the administrative proceedings. When the private bill was adversely acted upon, the Service, on June 21, 1966, directed respondent to appear for deportation (A. 39, 63). On June 22, respondent renewed his application for parole, again seeking a hearing before a special inquiry officer on his request for relief under Section 243(h) (A. 35–36). Respondent noted in his petition that, subsequent to the administrative hearing on his prior application, Section 243(h) had been amended to authorize a withholding of deportation whenever the consequence would be "persecution on account of race, religion, or political opinion", not only "*physical* persecution" as before (A. 35).[5]

On June 23, the District Director denied the new application without a hearing (A. 36–38). He noted that respondent's previous hearing had been held under the regulation, not the statute, and that the regulation had always read as the statute had been amended to read (A. 37).[6] He reiterated his position that respondent was not entitled to a hearing before a special inquiry officer and cited the earlier district court decision approving this view (A. 37–38).

[5] See Act of October 3, 1965, Section 11(f), 79 Stat. 918, amending Section 243(h) in the manner referred to.

[6] But see note 20, *infra*.

On the same day, June 23, 1966, respondent filed a complaint in the district court alleging that he was entitled to a Section 242(b) hearing before a special inquiry officer and requesting a restraining order (A. 38–42). An order to show cause was issued (A. 43–44) and a hearing was held, at which the Service relied on the court's earlier orders (A. 44). On June 24, 1966, the district court (Kilkenny, D.J.) entered judgment against respondent on the pleadings (A. 44–45).

On April 17, 1968, the court of appeals reversed (A. 61–76). It ruled that, because the District Director's order of June 23, 1966, denying respondent's application for relief from deportation, had been entered after respondent's ship had departed from the United States, expulsion under Section 252(b) was no longer authorized. Accordingly, the court held that respondent could not be deported except in accordance with the detailed administrative procedure of Section 242(b).

SUMMARY OF ARGUMENT

Section 252(b) of the Immigration and Nationality Act authorizes an immigration officer, if he determines that an alien crewman who has been granted shore leave on his promise to depart with his ship does not intend to do so, to revoke the crewman's conditional landing permit, take him into custody, and order the master of the vessel to receive and detain him on board "if practicable;" the crewman "shall be deported from the United States at the expense of the transportation line which brought him * * *." Section 252(b) expressly provides that "Nothing in

this section shall be construed to require the procedure prescribed in [Section 242 of the Act] to cases falling within the provisions of this subsection." The court below recognized that respondent's conditional landing permit was properly revoked under Section 252(b) and that he could have been lawfully deported if he had been removed to his ship. But the court held that since respondent's ship sailed during the pendency of administrative and judicial proceedings in respect of his claim that he would be persecuted if he returned to Yugoslavia, he could not be deported except pursuant to proceedings under Section 242.

Contrary to the rationale of the decision below, the fact that respondent was unable to be deported on his ship does not render the expulsion procedures prescribed in Section 252(b) inapplicable. Although the presence of the crewman's ship ordinarily may be expected to provide a prompt and convenient means of effecting his deportation, the provision authorizing the crewman's removal to his ship "if practicable" shows that Congress anticipated that it might not be feasible to deport the crewman on the vessel on which he arrived. Congress did not say or intimate that in the event the crewman could not be removed on his ship the Section 252(b) proceeding was to abort. The words reflect a determination by Congress to give flexibility to the Service with respect to the physical means of deporting the crewman, without encumbering the expulsion process with the full procedure required in other cases. Certainly a typical contingency in which it would not be "practicable" to deport the

crewmen on his own ship would be if the ship had sailed from our waters.

Section 254, which the court of appeals cited as supporting its construction of Section 252(b), provides further evidence of the discretion which Congress authorized in the selection of the method of deportation. Section 254(c) provides that if the Attorney General finds that deportation of a crewman on the vessel on which he arrived "is impracticable or impossible, or would cause undue hardship" to the crewman, he may cause him to be deported on another vessel of the same transportation line, "unless the Attorney General finds this to be impracticable." The reasonable inference is that if the Attorney General finds it impossible or impracticable to remove the crewman either on his own ship or on another of the same line he may effect the removal by other means. Nothing in those provisions supports the conclusion that if deportation by either of those methods would be impracticable, the Section 252(b) proceeding must terminate and a new proceeding under Section 242 be initiated.

Contrary to the decision below, the fact that Section 252(b) has been held inapplicable where expulsion proceedings are begun after the crewman's ship has sailed is not a reason for requiring abandonment of a seasonably commenced proceeding because the ship sails before deportation can be effected. If the validity of a deportation order entered pursuant to Section 252(b) depends, as the court below held, on the ability of the Service to deport the crewman on his own ship, Congress' expressed intent not to require a full eviden-

tiary hearing under Section 242 before a special inquiry officer in proceedings to expel alien crewmen under Section 252(b) could be readily defeated. As this case demonstrates, a crewman whose conditional landing permit has been revoked pursuant to Section 252(b) can easily prolong the expulsion process until after his ship has sailed.

Finally, a hearing before a special inquiry officer on a claim of anticipated persecution is not required by Section 243(h) even in ordinary expulsion proceedings under Section 242. By regulations designed to provide for resolution of all issues in a single proceeding, applications for asylum under Section 243(h), as well as for other forms of discretionary relief, are ruled on in the first instance by the special inquiry officer in cases in which Section 242 procedures are required. Requests for asylum made by crewmen against whom proceedings under Section 252(b) have been instituted, however, are governed by a different regulation, under which the decision whether parole shall be granted is made by the District Director. Since it is undisputed that respondent was fully heard under the regulation, in proceedings which have received careful judicial review, he has been accorded the full procedural protection to which he is entitled.

ARGUMENT

AN EXPULSION PROCEEDING UNDER SECTION 252(b), COMMENCED WHILE THE CREWMAN'S SHIP IS STILL IN PORT, NEED NOT BE ABANDONED, AND NEW PROCEEDINGS UNDER SECTION 242 INITIATED, IF THE SHIP SAILS BEFORE THE CREWMAN'S DEPORTATION THEREON CAN BE EFFECTED

Section 252(a)(1) provides that an immigration officer may, in his discretion, grant an alien crewman a conditional permit to land in the United States, "subject to revocation in subsequent proceedings as provided in subsection (b)," for the period (not to exceed 29 days) during which his vessel[7] remains in port. Under subsection (b), an immigration officer may revoke the conditional permit if he determines that the alien "is not a bona fide crewman, or does not intend to depart on the vessel * * * which brought him"; the immigration officer may then

> take such crewman into custody, and require the master or commanding officer of the vessel * * * on which the crewman arrived to receive and detain him on board such vessel * * *, if practicable, and such crewman shall be deported from the United States at the expense of the transportation line which brought him to the United States. * * * Nothing in this section shall be construed to require the procedure prescribed in [Section 242 of the Act] to cases falling within the provisions of this subsection.

[7] Although the Act's provisions with respect to alien crewmen also apply to *airmen*, see note 10, 13, *infra*, our discussion is limited to cases involving alien *seamen*.

This case involves the applicability of the exemption from the detailed hearing requirements of Section 242 where expulsion [8] proceedings are initiated under Section 252(b) while the alien crewman's ship is still in port, but the crewman is unable to be deported on that ship. After respondent advised an immigration officer that he did not intend to depart on his ship, his conditional landing permit was revoked and he was ordered returned to his ship for deportation. Respondent's ship sailed, however, during the pendency of judicial proceedings to test the legality of his expulsion in respect of the claim that he would be persecuted if he returned to Yugoslavia. The issue here is whether, after the entry of a final judgment sustaining the validity of his expulsion under Section 252(b), and the intervening departure of his ship, petitioner may be deported on the basis of the Section 252(b) proceeding, without commencing a new proceeding pursuant to Section 242.

The court below answered this question in the negative. Under the court's interpretation of the Act, expulsion and deportation pursuant to Section 252(b) "is authorized only if it can be accomplished by returning the crewman to his own vessel, with an

[8] In this brief we have adopted the terminology employed by the Court in *Kwong Hai Chew* v. *Colding*, 344 U.S. 590, 596 n. 4: "'[E]xclusion' means preventing someone from entering the United States who is actually outside of the United States or is treated as being so. 'Expulsion' means forcing someone out of the United States who is actually within the United States or is treated as being so. 'Deportation' means the moving of someone away from the United States, after his exclusion or expulsion." See also *Leng May Ma* v. *Barber*, 357 U.S. 185, 187.

exception for practical exigencies which goes no farther than to permit prompt deportation on another vessel arranged before the departure of the vessel on which the alien was a crewman" (A. 69). The court held, therefore, that respondent could be deported only after a hearing before a special inquiry officer pursuant to Section 242.

We believe that the decision below distorts the plain meaning of Section 252 to achieve a result which has no support in the history or purpose of the Act's provisions relating to alien crewmen. Section 252 was one of several provisions enacted by Congress in response to the problems presented by alien crewmen who, like respondent, are tempted to use the privilege of shore leave as a means to effect unlawful permanent residence in the United States (see pp. 20–21, *infra*). The court below recognized that expulsion proceedings under Section 252(b) were properly invoked in this case and that respondent could have been lawfully deported if the judicial proceedings which he instituted had been completed while his ship remained in port (A. 66). But by limiting the applicability of Section 252(b) to circumstances which are largely within the control of the crewman, the court below has rendered virtually useless the procedure which Congress prescribed for the expulsion of alien crewmen who, like respondent, do not intend to depart on their ships. In addition, the decision below conflicts with the holdings of the only other circuits in which the same issue has arisen: *United States ex rel. Kordic* v. *Esperdy*, 386 F. 2d 232 (C.A. 2), cer-

tiorari denied, 392 U.S. 935, and *Glavic* v. *Beechie*, 340 F. 2d 91 (C.A. 5), affirming 225 F. Supp. 24 (S.D. Tex.).

A. THE EXPULSION PROCEDURES OF SECTION 252(b) WERE ENACTED IN RESPONSE TO THE SERIOUS PROBLEMS PRESENTED BY THE ABUSE OF SHORE LEAVE PRIVILEGES AND THE PURPOSE OF THE PROVISION WOULD BE FRUSTRATED UNDER THE DECISION BELOW

1. Section 252 provides the exclusive procedures for the temporary admission, other than by parole, of nonimmigrant alien crewmen.[9] Temporary landing permits may be issued only to persons who are within the

[9] An alien crewman who is seeking admission as an immigrant and who is in possession of valid immigrant documents may be admitted for permanent residence in accordance with Sections 235–237 of the Act, 8 U.S.C. 1225–1227 (8 C.F.R. 252.1(b)(1)).

As in cases involving other classes of nonimmigrants, the Attorney General may, in his discretion, waive certain grounds for the exclusion of alien crewmen (Section 212(d)(3)(B), 8 U.S.C. 1182(d)(3)(B)) or temporarily parole an alien crewman into the United States "for emergent reasons or reasons deemed strictly in the public interest" (Section 212(d)(5), 8 U.S.C. 1182(d)(5)) or for hospital treatment in the case of a crewman who is inadmissible for health reasons (Section 253, 8 U.S.C. 1283) (8 C.F.R. 253.1). Such parole, however, "shall not be regarded as an admission of the alien" (Section 212(d)(5)).

Although it would seem possible for an alien crewman to obtain an individual visa under some other nonimmigrant classification (*e.g.*, as a tourist under Section 101(a)(15)(B), 8 U.S.C. 1101(a)(15)(B)), neither the Act nor the regulations provide that the crewman's possession of such a visa authorizes his admission under the procedures prescribed in Sections 235–237 rather than the provisions of Section 252(a).

definition of "crewman" in Section 101(a)(15)(D)[10] and who are not otherwise excludable on any of the grounds enumerated in Section 212(a). Unlike other classes of nonimmigrant aliens,[11] a crewman may be admitted without an individual visa if the crew list on which his name appears has been visaed by a consular officer.[12] If the immigration officer finds that the crewman is eligible to land temporarily, he may, in his discretion, issue a conditional landing permit under subsection (a)(1), for the period (not to exceed 29 days) during which the vessel is in port, if he is satisfied that the crewman intends to depart on that vessel,[13]

[10] Section 101(a)(10), 8 U.S.C. 1101(a)(10) defines "crewman" as "a person serving in any capacity on board a vessel or aircraft." Under Section 101(a)(15)(D), 8 U.S.C. 1101(a)(15)(D), nonimmigrant status is accorded to

> an alien crewman serving in good faith as such in any capacity required for normal operation and service on board a vessel (other than a fishing vessel having its home port or an operating base in the United States) or aircraft, who intends to land temporarily and solely in pursuit of his calling as a crewman and to depart from the United States with the vessel or aircraft on which he arrived or some other vessel or aircraft.

[11] An alien within one of the other classes of nonimmigrants defined in Section 101(a)(15) may be admitted for temporary residence or travel in the United States provided he has obtained a valid nonimmigrant visa from a consular officer and is not subject to any of the other grounds for exclusion specified in Section 212 (Sections 212(a)(26)(B) (8 U.S.C. 1182(a)(26)(B)), 214 (8 U.S.C. 1184), 221(a)-(c) (8 U.S.C. 1201(a)-(c)), 222(c)-(d) (8 U.S.C. 1202(c)-(d)).

[12] Section 221(f), 8 U.S.C. 1201(f).

[13] Under 8 C.F.R. 252.1(d), a conditional landing permit may be issued under Section 252(a)(1) to a crewman who intends to rejoin his vessel at another United States port and has received written permission from the master of his vessel to do so (see

or under subsection (a)(2), for a period not to exceed 29 days if he is satisfied that the crewman intends to depart on another vessel within that period."[14]

Unlike other classes of nonimmigrant aliens, the alien crewman has no right to a hearing before a special inquiry officer on the question of his admissibility into the United States.[15] The decision of the immigration officer refusing to issue a landing permit is a final administrative determination, without right to appeal to the Board of Immigration Appeals, and the master must detain the crewman aboard the vessel while it is in port and remove him from the United States when the vessel sails.[16] Alien crewmen

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note, [illegible], *infra*). That regulation also provides that airmen may be issued permits under Section 252(a)(1) ("D–1" permits) with the understanding that they will depart within 29 days on another aircraft of the same transportation line. Although the court below apparently did not consider the effect of its decision on the expulsion of airmen under Section 252(b), in the case of an aircraft which changes its crew in the United States it would ordinarily be impossible to satisfy the court's requirement that an *airman* granted a D–1 permit must be deported on his own aircraft or on "another [aircraft] arranged before the departure of the [aircraft] on which the alien was a crewman" (A. 69, see pp. 12–13, *supra*; note 34, *infra*).

[14] Definite arrangements for the crewman to depart on another vessel must be made prior to the issuance of the landing permit and the immigration officer must give prior consent to the discharge of the crewman from his ship's company (8 C.F.R. 252.1 (d)(2)). Section 256 of the Act, 8 U.S.C. 1286, imposes a penalty of $1000 on the master of a vessel who discharges an alien crewman without obtaining prior consent.

[15] Section 235(b), 8 U.S.C. 1225(b); 8 C.F.R. 235.6(a), 252.1(b).

[16] Sections 235(b) (8 U.S.C. 1225(b)), 236(b) (8 U.S.C. 1226(b)), 254 (8 U.S.C. 1284); see pp. 30–33, *infra*.

In all cases, upon the alien's arrival at a port of entry he is inspected by an immigration officer to determine whether he is

who are admitted under Section 252, unlike other classes of nonimmigrants, are not eligible to obtain an adjustment of status to permanent residence or to another nonimmigrant classification.[17]

Section 252(b), quoted above, prescribes a special procedure for the expulsion of an alien crewman, like respondent, who has been granted a conditional landing permit (under Section 252(a)(1)) for the period during which his vessel is in port. If an immigration officer determines that the alien is not a bona fide

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eligible for admission into the United States (Sections 232–235 (a), 8 U.S.C. 1222–1225(a)). Except in cases involving *alien crewmen*, stowaways, and subversive aliens, if it does not appear to the immigration officer that the alien is "clearly and beyond a doubt entitled to land," the alien is detained for an evidentiary hearing before a special inquiry officer (Sections 235(b)–(c) (8 U.S.C. 1225(b)–(c)), 273(d) (8 U.S.C. 1323(d)); in most cases, aliens are paroled into the United States under Section 212(d)(5) pending determination of their admissibility, see *Leng May Ma* v. *Barber*, 357 U.S. 185, 186, 190). If the special inquiry officer determines that the alien is ineligible for admission, the alien may appeal to the Board of Immigration Appeals (Section 236(b) (8 U.S.C. 1226(b), 8 C.F.R. 236.5). When a final order of exclusion has been entered, the alien is to be immediately deported "to the country whence he came" and, if practicable, on the same vessel on which he arrived (Section 237(a), 8 U.S.C. 1227(a); except in certain cases, the expenses of detention and deportation of the excluded alien are to be borne by the transportation line which brought him, *ibid.*). An alien may obtain judicial review of a final exclusion order only by habeas corpus proceedings (Section 106(b), 8 U.S.C. 1105a(b)).

[17] Sections 245 (8 U.S.C. 1255), 248 (8 U.S.C. 1258); 8 C.F.R. 252.1(f). The regulation provides, however, that an alien crewman granted a permit under Section 252(a)(1) may be granted a permit under Section 252(a)(2) authorizing him to depart on another ship if the crewman is otherwise eligible for such a permit, see note 14, *supra*.

crewman or does not intend to depart on his ship, he may revoke the landing permit, take the alien into custody, and, if practicable, require the master of his vessel to detain him on board. The alien crewman is to be deported from the United States at the expense of the transportation line which brought him. An alien crewman whose landing permit is revoked while his vessel is in port, unlike other classes of nonimmigrants, is not entitled to a hearing before a special inquiry officer or to review by the Board of Immigration Appeals,[18] nor is he eligible for discretionary relief by suspension of deportation and adjustment of status to permanent residence.[19] By regulation, an

[18] See p. 11, *supra*.

An alien in the United States (including an alien crewman) may be expelled and deported for any of the grounds enumerated in Section 241(a) (8 U.S.C. 1251(a)). An alien who must be proceeded against under Section 242 (8 U.S.C. 1252) (excluding an alien crewman whose landing permit has been revoked under Section 252(b)) is entitled to notice and an evidentiary hearing (with counsel) before a special inquiry officer, whose finding that the alien is deportable must be supported by substantial evidence. The alien may appeal an order of deportation to the Board of Immigration Appeals (8 C.F.R. 242.21), and, if the order is upheld by the Board, he may obtain judicial review on the administrative record exclusively in a court of appeals (Section 106(a), 8 U.S.C. 1105a(a)); see *Foti* v. *Immigration and Naturalization Service*, 375 U.S. 217; *Cheng Fan Kwok* v. *Immigration and Naturalization Service*, 392 U.S. 206.

[19] Sections 244(f) (8 U.S.C. (Supp. III) 1254(f)), 245 (8 U.S.C. 1255).

Under Sections 243 and 244 (8 U.S.C. 1253, 1254), the Attorney General is authorized to designate the country to which the alien will be deported (if practicable, to a country designated by the alien) (Section 243(a)), and in his discretion, to allow the alien to depart voluntarily at his own expense (Section 244(e)), to suspend deportation and adjust the alien's status to permanent residence (Section 244(a)–(d)), and under

alien crewman whose landing permit has been revoked and who claims that he would be persecuted if he returned to a Communist country may be paroled into the United States in the discretion of the District Director.[20]

Section 243(h), to withhold deportation to any country in which the alien would be subject to persecution. By regulation, the designation of the country to which the alien is to be deported and the granting of any discretionary relief is made by the special inquiry officer in the original expulsion proceedings (8 C.F.R. 242.17, 245.2(a); see p. 36, *infra*).

Section 244(f), which specifies that all of the provisions of Section 244 shall be *inapplicable* to aliens who entered the United States as crewmen, would appear to bar the allowance of voluntary departure to an alien crewman (Section 244(e)) as well as suspension of deportation (Sections 244(a)–(d)). The Board of Immigration Appeals has ruled, however, that the exemption of alien crewmen in Section 244(f), which was added in 1962 together with a revision of the provisions relating to suspension of deportation, was intended to apply only to suspension of deportation and that it did not bar discretionary relief by allowance of voluntary departure to a crewman who had overstayed his leave and who was ordered deported under Section 242 (*Matter of Vara-Rodriguez*, 10 I. & N. 113).

The pertinent regulation (8 C.F.R. 252.2) with respect to crewmen who are proceeded against under Section 252(b) is silent with respect to the method of selecting the country to which the crewman is to be deported and the availability of voluntary departure in cases where the crewman is unable to be deported on the ship which brought him.

[20] 8 C.F.R. 253.1(f) (formerly 8 C.F.R. 253.1(e), see Appendix, *infra*, p. 46). The circumstances in which relief may be granted under the regulation may not be precisely coextensive with the discretionary relief available under the statutory counterpart, Section 243(h), since the regulation is addressed to anticipated persecution in a "Communist, Communist-dominated, or Communist-occupied country," while the statute speaks of persecution in "any country."

The expulsion procedures of Section 252(b) do not apply, however, to a crewman who jumps ship and enters with no permit at all;[21] nor to a crewman admitted on condition that he depart within 29 days on another vessel who fails to comply with the condition;[22] nor to a crewman admitted (like respondent) with the understanding that he will leave on the same vessel, if the ship sails before his landing permit is revoked.[23] In those cases, the crewman can be proceeded against only in accordance with the procedures of Section 242.[24]

2. The foregoing provisions—as well as other, equally important provisions specifying the duties and liabilities of transportation lines with respect to the detention and deportation of alien crewmen[25]—demonstrate Congress' particular concern for the effective regulation of temporary shore leave. In the legislative studies leading to the enactment of the Immigration and Nationality Act, Congress recognized that the traditional privilege of shore leave is necessary to international trade and comity. It also found, however, that shore leave had become an easy and frequently used method for alien crewmen to desert their ships and remain illegally in the United States. See S. Rep. No.

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[21] See *United States ex rel. Kordic* v. *Esperdy*, *supra*, 386 F. 2d at 237.

[22] 1 Gordon & Rosenfield, *Immigration Law and Procedure* (1967 rev.), §§ 6.3a, 6.3b.

[23] *Matter of M*, 5 I. & N. 127; see *Cheng Fan Kwok* v. *Immigration and Naturalization Service*, 392 U.S. 206, 207.

[24] 1 Gordon & Rosenfield, *supra*, § 6.3b.

[25] Sections 254–257, 8 U.S.C. 1284–1287; see generally 1 Gordon & Rosenfield, *supra*, § 6.4.

1515, 81st Cong., 2d Sess., pp. 550–558.[26] The exceptions from ordinary procedures which Congress prescribed in cases involving alien crewmen reflect the particular individual and governmental considerations with respect to the regulation of shore leave privileges.

Other classes of nonimmigrant aliens defined in the Act are comprised largely of persons who seek admission to this country to pursue their employment or education or for temporary personal or business purposes.[27] Their coming here frequently involves great expense to the individual or his employer and dislocation of his family or separation from them. Denial of admission to such a person at a port of entry, or expulsion prior to the completion of the purpose of his visit, imposes even greater expense and

[26] *Id.* at 550:

> The problems relating to seamen are largely created by those who desert their ships, remain here illegally beyond the time granted them to stay, and become lost in the general populace of the country. For a number of years, it has been generally recognized, both by Government officials and others, that the temporary "shore leave" admission of alien seamen who remain illegally constitutes one of the most important loopholes in our whole system of restriction and control of the entry of aliens into the United States. The efforts to apprehend these alien seamen for deportation are encumbered by many technicalities invoked in behalf of the alien seamen and create conditions incident to enforcement of the laws which have troubled the authorities for many years.

The Senate Report also discusses the provisions governing the admission and expulsion of alien crewmen prior to the enactment of the Immigration and Nationality Act, *id.* at 545–548, 624–629.

[27] See *e.g.*, Section 101(a)(15) (B), (E), (F), (H), 8 U.S.C. 1101(a)(15) (B), (E), (F), (H).

dislocation and the risk of future prejudice. An alien crewman, on the other hand, arrives in this country at no personal expense and without the prior screening by a consular officer required of other nonimmigrant aliens;[28] his separation from his home and family is not incident to any purpose in the United States but to his calling as a crewman, irrespective of what countries his ship may visit. Although shore leave provides an opportunity for relief from the crewman's life at sea, the denial or suspension of that temporary privilege plainly involves none of the serious consequences which may result from the exclusion or expulsion of other nonimmigrants. And in view of the frequent abuses of shore leave privileges, Congress reasonably provided for the conditional entry of alien crewmen[29] and prescribed less formal procedures for their admission and, in some cases, for their expulsion.

As already noted, Congress did not authorize expulsion proceedings under Section 252(b) for alien crewmen in all circumstances. Section 252(b) ap-

[28] See Sections 221(a)–(b), (d), (g) (8 U.S.C. 1201(a)–(b), (d), (g)), 222(c)–(e) (8 U.S.C. 1202(c)–(e)); see generally 1 Gordon & Rosenfield, *supra*, §§ 3.9–3.11.

[29] The landing permit (Form I–95) provides: "By accepting this conditional permit to land the holder agrees to all the conditions incident to the issuance thereof, and to deportation from the United States in accordance with the provisions of section 252(b) of the Immigration and Nationality Act." In *United States ex rel. Stellas* v. *Esperdy*, 366 F. 2d 266 (C.A. 2), vacated on other grounds, 388 U.S. 462, the court noted, in dictum (366 F. 2d at 269), that an alien crewman "waive[s] any Constitutional right to full-scale deportation proceedings" by accepting the conditional landing permit. Compare A. 65 n. 2.

plies only to crewmen who are permitted to land with the understanding that they will depart with their ships and who are found to have a contrary intention during the time their ships are still in port. The difference in procedures, based upon the presence of the crewmen's ships in port, is entirely reasonable. Crewmen who overstay their landing privileges are, of course, subject to expulsion.[30] But within that class there may be many crewmen who have been able to evade detection for a number of years and who have established family or business relationships in this country.[31] Although these relationships have been established during a period of unlawful residence, the expulsion of the crewman may have serious consequences, similar to those in cases involving immigrant aliens, which make appropriate a formal hearing, including disposition of any requests for discretionary relief from expulsion to which the crewman may be eligible.[32] In cases involving alien

[30] See Section 241(a)(9), 8 U.S.C. 1251(a)(9).

[31] See *Foti* v. *Immigration and Naturalization Service*, 375 U.S. 217, 218 (10 years' unlawful residence).

[32] As noted above, pp. 17–19 & nn. 17, 19, *supra*, aliens who entered the United States as crewmen are ineligible for suspension of deportation and adjustment of status to permanent residence. Although the congressional studies which led to the Immigration and Nationality Act noted that alien crewmen who had remained unlawfully in the United States frequently used those methods to cure their illegal status (see S. Rep. No. 1515, 81st Cong., 2d Sess., pp. 556, 594–603), the Act, as originally passed, did not preclude alien crewmen from obtaining such discretionary relief. Alien crewmen were excluded from relief under Section 245 (8 U.S.C. 1255) (the general provision for adjustment of status of non-deportable aliens) in 1960 (P.L. 86–648, Section 10, 74 Stat. 505) because of the

crewmen who are proceeded against under Section 252(b), however, the limited time during which such proceedings are authorized—while the crewmen's ship is still in port—necessarily precludes the possibility that the crewman's status will have been altered in reliance on his expectation of remaining in the United States. The presence of the crewman's ship, moreover, would ordinarily provide a prompt and convenient means of effecting his removal. But, as we argue below, the departure of the ship before the crewman can be physically placed on board does not require a new proceeding under Section 242.

3. The decision below frustrates the directive expressed in the final sentence of Section 252(b):

> Nothing in this section shall be construed to require the procedure prescribed in [Section 242 of the Act] to cases falling within the provisions of this subsection.

The effect of that provision in the circumstances of this case is unambiguously stated in the House and Senate committee reports (H. Rep. No. 1365, 82d Cong.,

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"frequent abuses of the immigration laws by deserting seamen" (H. Rept. No. 2088, 86th Cong., 2d Sess., p. 2). In the 1962 amendments to the Act (P.L. 87–885, Section 4, 76 Stat. 1249) alien crewmen were made ineligible to obtain suspension of deportation and adjustment of status (for deportable aliens) under Section 244(a) (8 U.S.C. 1254(a), see *Foti* v. *Immigration and Naturalization Service*, 375 U.S. 217, 220 n. 4). "The excessive severity of this absolute preclusion, which did not permit consideration of equities established by long-time residents, led to the 1965 amendment restricting the preclusion of suspension to crewmen who entered after June 30, 1964" (2 Gordon & Rosenfield, *supra*, § 7.9c(1)). See P.L. 89–236, Section 12(b), 79 Stat. 918, amending Section 244(f) of the Act, 8 U.S.C. (Supp. III) 1254(f).

2d Sess., p. 66; S. Rep. No. 1137, 82d Cong., 2d Sess., pp. 35–36):

> The procedure set forth in section 242 of the bill is not applicable in the case of the removal of a crewman whose conditional permit to land temporarily has been revoked.

Yet, this congressional intent could be readily defeated under the court of appeals' narrow construction of Section 252(b). The fact is that a crewman whose landing permit has been revoked while his ship is still in a United States port can easily delay his removal until after his vessel has departed. Indeed, in both this case and in *United States ex rel. Kordic* v. *Esperdy, supra,* 386 F. 2d at 233–234, the crewmen were able, by resort to a variety of administrative and judicial proceedings, to achieve that very result. The period during which a ship will remain in American waters is variable and usually short. A tanker, which does not have to find new cargo, for example, may sail as early as the next favorable tide after discharging its cargo. The government has no power to force the ship to postpone its departure until judicial review of the crewman's expulsion or administrative proceedings on a claim of persecution can be completed.

The court of appeals attempted to answer the contention that its interpretation of Section 252(b), plus the availability of judicial review of the crewman's expulsion, would render the section useless for any purpose even when properly invoked while the crewman's vessel was still in port. Thus, contrary to the obvious fact that respondent's removal on board his

ship was prevented by his suit to enjoin his deportation, the court below cited the present case as proof that "no great delay need be involved in the disposition of applications for relief" (A. 75). To substantiate that observation, the court noted (*id.* n. 18) that:

> Appellant's [respondent's] complaint was filed on the day the District Director's order was entered. The district court issued an order to show cause on the same day, returnable the following morning. The hearing was held as noticed, and an order denying relief was entered in the course of the same day.

The proceedings cited by the court of appeals, however, were not the proceedings on respondent's initial injunction action after his conditional landing permit had been revoked, but rather the proceedings before Judge Kilkenny on respondent's subsequent suit to enjoin his deportation after his unsuccessful quest for relief by private bill and the unsuccessful renewal of his request for administrative parole (pp. 6–7, *supra*). The initial suit, decided by Judge East, had been instituted in January 1965, a year and a half earlier, and had not finally been adjudicated until July 1965, following the resumption of the administrative proceedings pursuant to Judge East's remand order (pp. 4–5, *supra*). Judge Kilkenny, whose decision in respondent's second injunction suit was reversed by the court of appeals, would not have been able to rule on the issues with such dispatch had it not been for the prior litigation before Judge East.

B. NOTWITHSTANDING THE DEPARTURE OF RESPONDENT'S SHIP BEFORE HIS DEPORTATION COULD BE EFFECTED, RESPONDENT'S EXPULSION WAS A CASE "WITHIN" SECTION 252(b) AND THEREFORE EXEMPT FROM THE REQUIREMENTS OF SECTION 242

1. The court of appeals' holding that respondent may not be deported except after detailed administrative proceedings under Section 242 must rest, if the statutory command is to be given effect, on a finding that respondent's expulsion is not a case "falling within" Section 252(b). Although that formulation is not expressly stated in the court's opinion, the court concluded that Section 252(b) is inapplicable, with certain narrow exceptions not encompassing this case (see p. 29, *infra*), where the crewman is unable to be deported on the ship on which he arrived. That determination proceeds from the court's interpretation of the provision in Section 252(b) which authorizes an immigration officer, after he has revoked the conditional landing permit, to "take such crewman into custody, and require the master * * * of the vessel * * * on which the crewman arrived to receive and detain him on board such vessel * * *, if practicable, and such crewman shall be deported from the United States at the expense of the transportation line which brought him * * *." The principal error in the court's reasoning is that it has viewed the presence of the crewman's ship not only as a limitation on the circumstances in which proceedings under Section 252(b) may be initiated but also as a limitation on the circumstances in which the crewman's deportation may be effected under that section after his landing permit has been revoked.

From the language quoted above, it is apparent that Congress contemplated that a crewman whose landing permit was revoked in a proceeding commenced under Section 252(b) would ordinarily be deported aboard the ship on which he arrived. To that extent there can be no quarrel with the assumptions underlying the court of appeals' decision. But it is also clear that Congress recognized the possibility that another mode of removal might be necessary. The words "if practicable" show that Congress anticipated that for a variety of reasons it might not be feasible to require the master of the crewman's own vessel to "receive and detain him on board." The plain implication is that if this is not practicable it should not be required. But Congress did not say or intimate that in the event that the crewman could not be removed on his ship, the Section 252(b) proceeding was to abort and the crewman's deportation would be unlawful except in accordance with proceedings commenced anew before a special inquiry officer under Section 242. After *authorizing* the Service to require the master of the crewman's vessel to receive him on board "if practicable," the statute directs, in mandatory terms, that "such crewman shall be deported from the United States at the expense of the transportation line which brought him." The fair interpretation of these provisions, particularly when read in conjunction with the final sentence that nothing contained in the section is to be "construed to require the procedure prescribed in [Section 242]," is that Congress intended to give flexibility to the Service with respect to the physical means of effecting the crewman's removal,

without encumbering the expulsion process with the procedures required in other cases.

2. Referring to the "if practicable" clause of Section 252(b), the court of appeals commented (A. 71 n. 12) that:

> Later provisions of the statute indicate that the qualification "if practicable" refers to a condition affecting a particular crewman or vessel which renders immediate detention aboard unfeasible, such as illness of the crewman or movement of the vessel to another port of the United States, *but not to the departure of the vessel for a foreign port.* [Emphasis added.]

We can find no support in the language or legislative history of the statute, however, for the court's conclusion that the applicability of Section 252(b) should depend on the wholly fortuitous event that the crewman's ship subsequently sailed for another United States port rather than a foreign port. Certainly a typical contingency in which it would not be "practicable" to deport the crewman on the vessel on which he arrived would be one in which the ship had sailed from our waters. Indeed that would be a more obvious kind of "impracticability" than if the ship were still in our waters but in another port.[33]

[33] The court apparently derived the limited exception for the "movement of the [crewman's] vessel to another port of the United States" from the regulation (8 C.F.R. 252.1(d), see note 13, *supra*) authorizing the issuance of a "D–1" permit to a crewman who intends to join his ship at a port other than the port of his entry. Presumably the court would allow deportation pursuant to Section 252(b) by removing such a crewmen to the port at which his ship is found. But, in view of the source

The "later provisions" to which the court referred are contained in Section 254 (8 U.S.C. 1284, Appendix, *infra*, pp. 42–44). Nothing in Section 254, however, supports the court's differentiation between the sailing of the crewman's ship for a foreign port and its departure for another United States port. Insofar as Section 254 is relevant to the question here, it provides further evidence that if the Service, for any cogent reason, determines that it would not be practicable to use the crewman's ship to effect his deportation pursuant to proceedings properly commenced under Section 252(b), it may use other means to effectuate its order.

Section 254(a) imposes a fine upon the owner or master of a vessel who fails to remove an alien crewman of his ship whom he has been ordered to deport under Section 252. Section 254(b) provides that proof that the name of such crewman did not appear on the outgoing manifest of the vessel shall be *prima facie* evidence of the master's failure to effect the deportation. Section 254(c) provides:

> If the Attorney General finds that deportation of an alien crewman under this section on the vessel * * * on which he arrived is impracticable or impossible, or would cause undue hardship to such alien crewman, he may cause the alien crewman to be deported from the port of arrival or any other port on another vessel

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of the "exception," it is not entirely clear whether the court would approve such removal in a case, like the present case, where the crewman had not obtained permission to rejoin his ship at another port.

> * * * of the same transportation line, unless the Attorney General finds this to be impracticable. * * * The vessel * * * on which the alien arrived shall not be granted clearance until [the expenses of the crewman's detention and deportation] have been paid or their payment guaranteed to the satisfaction of the Attorney General. * * *

On the basis of Section 254(c), the court apparently concluded that unless the deportation of a crewman proceeded against under Section 252(b) can be effected either on the crewman's ship or on another vessel of the same transportation line pursuant to arrangements made prior to his ship's departure, the proceeding necessarily aborts and the removal process must be started over again with full proceedings before a special inquiry officer.[34] We find nothing

[34] The court of appeals commented as follows on Section 254 (c) (A. 72–73):

> Although the first sentence recognizes that removal of a crewman following summary revocation of his landing permit may be accomplished on a vessel other than the one upon which the crewman arrived, the only alternative authorized is deportation "on another vessel or aircraft of the same transportation line," if this be practicable. The Attorney General is not given general authority to deport the alien crewman by any available means. More significantly, the section contemplates that the alternative arrangement shall be made while the vessel upon which the crewman arrived is still in port—his ship is not to be cleared for departure until the expenses incident to the alternative arrangement have been paid or guaranteed.

We note that the "exception for practical exigencies" which the court recognized at an earlier part of its opinion (A. 69, see pp. 12–13, *supra*) appears to permit prompt deportation of the crewman on *any* vessel other than the one he arrived on if the arrangement is made prior to his own ship's departure—not

in Section 254, however, which either requires or warrants this conclusion. It is evident that Congress' prime concern in that section is with penal and monetary matters—the exaction of fines from shipowners for failing to carry out deportation orders (subsections (a) and (b)) and ensuring that the expenses of deportation are borne by the owners of the vessels (subsection (c)). But Congress did not diminish the discretion given to the Attorney General as to the mode of effecting the removal of the crewman. Section 254(c) provides that if the Attorney General finds that the deportation of a crewman on the vessel on which he arrived "is impracticable or impossible, or would cause undue hardship" to the crewman, he may cause him to be deported, from the port of arrival or any other port, on another vessel of the same line, *unless the Attorney General finds this too to be impracticable*. Contrary to the interpretation of the court below, the reasonable inference is that if the Attorney General finds it impossible or impracticable to deport the crewman either on his own ship or on another vessel of the same line, he may effect the removal by other means.

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necessarily another vessel of the same line. Under the court's "exception," the Attorney General may use the alternative means if (1) it is employed promptly after the departure of the crewman's vessel and (2) it is "arranged before the departure of" that vessel. Leaving aside such troublesome collateral questions as *how* promptly the alternative means must be employed, there appears to be nothing in the statute which requires that the alternative mode of removal have been "arranged before the departure of" the crewman's ship.

Section 254(c) possibly contemplates that the alternative arrangement of deportation on another vessel of the same line will ordinarily be made while the crewman's ship is still in port. But where the vessels of the transportation line which employs the crewman make infrequent calls at United States ports, such an arrangement is plainly impracticable. And even if the Service does not obtain payment or security for the costs of the crewman's detention and deportation before his ship departs, there is no reason to believe that Congress intended that the failure of the Service to protect its pecuniary interests should thereby destroy the basis of the deportation order under Section 252(b) and entitle the crewman to a Section 242 proceeding.

3. The court of appeals found support for its decision in the fact that Section 252(b) is, by its terms, applicable only in a limited class of cases. Observing that the expulsion procedure of Section 252(b) would have been inapplicable if respondent's ship had sailed before his landing permit was revoked, the court remarked (A. 73):

> This much being conceded, it is difficult to see why the result should be different when section [252(b)] proceedings are begun, but not completed, before the vessel departs. Whenever the statutory scheme for utilizing the availability of an alien crewman's vessel to effect his speedy deportation is frustrated, the justification for quick resolution of the crewman's status is gone. What reason remains for not then affording the crewman the benefits of section [242]?

We submit, however, that the limited applicability of the statute is not a valid reason for construing it so narrowly that it is virtually useless to remedy the problem to which it is addressed. Acknowledging that under its interpretation "the time and effort which have already been invested in the aborted administrative process would be lost," the court observed that "summary deportation is not authorized simply as a device for saving administrative time, and, in any event, the time and effort invested in summary proceedings is, by definition, minimal" (A. 73). But the fact remains that Section 252(b) makes expressly clear that summary procedures are to apply where the crewman's ship is still in port when the expulsion process is initiated. The court's holding that a procedure that is valid when commenced must terminate and be replaced by new procedures if it is not concluded before the occurrence of a certain contingency represents a novel administrative doctrine. This case illustrates, moreover, that if the test of the validity of a Section 252(b) expulsion proceeding is whether the crewman's ship is still in port when it is concluded, the crewman has it within his power to defeat the expressed intention of Congress that the procedures prescribed by Section 242 shall not apply.

As noted above (p. 20, *supra*), Section 252(b) is a partial response to the serious problem presented by alien crewmen who abuse the privilege of shore leave. Congress determined that crewmen to whom that privilege is granted on their promise to depart with their ships should be promptly expelled if they manifest by their behavior, while their ships are still

in port, an intention to remain here beyond that time. Congress could, for example, have authorized similar procedures in cases involving ship-jumpers or other crewmen who overstay their temporary shore leave privileges. But the distinction which Congress made is a reasonable one (see p. 23, *supra*). Section 252(b) is applicable only in cases where immediate removal is likely to result in the least hardship to the crewman, and the grounds for expulsion are directly related to the regulation of shore leave and require findings that often cannot be made confidently until the crewman has landed. An unduly restrictive interpretation of Congress' limited direction could lead to a tightening of the policies respecting shore leave, to the detriment of international trade and comity and the disservice of all good faith applicants. Cf. *Leng May Ma* v. *Barber*, 357 U.S. 185, 190. As the court said in *United States ex rel. Kordic* v. *Esperdy, supra*, 386 F. 2d at 237, "Acceptance of appellants' position in this case, with its concomitant increase in the difficulty of expelling from the country seamen who suddenly decide to stay here permanently, would be quite likely to prompt some curtailment in the issuance of landing permits—an intention we are reluctant to impute to Congress."

C. EVEN IN ORDINARY EXPULSION PROCEEDINGS THERE IS NO STATUTORY RIGHT TO A HEARING BEFORE A SPECIAL INQUIRY OFFICER ON A REQUEST FOR ASYLUM UNDER SECTION 243(h)

Respondent has not questioned his deportability as an alien crewman whose conditional landing permit was validly revoked. His sole contention has been that he had a right to a hearing before a special inquiry

officer on his request for asylum under Section 243(h), which authorizes the Attorney General to withhold the deportation of an alien in the United States to any country in which, in his opinion, the alien would be subject to persecution on account of race, religion, or political opinion.

Even in ordinary expulsion proceedings under Section 242, however, there is no *statutory* right to a hearing before a special inquiry officer on a request for asylum under Section 243(h). The Act itself is silent with respect to the procedures to be followed in determining whether the Attorney General's authority should be favorably exercised in a particular case. By *regulation* (8 C.F.R. 242.8(a) and 242.17(c)) applications for relief under Section 243(h), as well as for other forms of discretionary relief (see note 19, *supra*), are ruled on in the first instance by the special inquiry officer who conducts the hearing under Section 242 and makes the primary determination of deportability. See *Foti* v. *Immigration and Naturalization Service,* 375 U.S. 217, 223; *Cheng Fan Kwok* v. *Immigration and Naturalization Service,* 392 U.S. 206, 212–213 n. 11, 214–215.[35] But a different

[35] Even in ordinary expulsion proceedings, however, this has not always been so. See *Foti* v. *Immigration and Naturalization Service*, *supra*, 375 U.S. at 230 n. 16. Prior to January 22, 1962 (26 F.R. 12112, 12114), the decision as to whether relief under Section 243(h) should be granted was made by the regional commissioner, an enforcement official, pursuant to a *recommendation* of a special inquiry officer (not necessarily the officer who made the determination of deportability) (8 C.F.R. (1958 rev.) 243.3(b)(2)).

regulation, 8 C.F.R. 253.1(e) (Appendix, *infra*, p. 46), governs requests for asylum made by crewmen against whom proceedings under Section 252(b) have been instituted. That regulation provides that an alien crewman whose conditional landing permit has been revoked and who claims that he cannot return to a Communist, Communist-dominated, or Communist-occupied country because of fear of persecution on account of race, religion or political opinion

> may be paroled into the United States under the provisions of section 212(d)(5) of the Act [36] for the period of time and under the conditions set by *the district director having jurisdiction over the area where the alien crewman is located.* [Emphasis added.]

Under that regulation a hearing before a special inquiry officer is not required. In ascertaining the facts relevant to the exercise of his discretion, the District Director may, as he did here, make use of the services of subordinate enforcement officials. *United States ex rel. Kordic* v. *Esperdy, supra,* 386 F. 2d at 234; *Glavic* v. *Beechie,* 225 F. Supp. 24, 25 (S.D. Tex),

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[36] Section 212(d)(5) (8 U.S.C. 1182(d)(5)) authorizes the Attorney General, in his discretion, to parole into the United States temporarily, on such conditions as he may prescribe, "for emergent reasons or for reasons deemed strictly in the public interest," any alien applying for admission. The statute provides that the parole shall not be regarded as an admission of the alien and that, when the purposes of the parole have been served, the alien shall be forthwith returned to the custody from which he was paroled and his case shall thereafter continue to be dealt with in the same manner as that of any other applicant for admission. See *Kaplan* v. *Tod,* 267 U.S. 228; cf. *Leng May Ma* v. *Barber,* 357 U.S. 185.

affirmed, 340 F. 2d 91 (C.A. 5).[37] It is undisputed that respondent was fully heard under the regulation in proceedings which received careful judicial review. He has been afforded the full procedural protection to which he is entitled.

CONCLUSION

It is therefore respectfully submitted that the judgment of the court of appeals should be reversed.

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DECEMBER 1968.

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[37] Nothing in *United States ex rel. Szlajmer* v. *Esperdy*, 188 F. Supp. 491 (S.D.N.Y.), is to the contrary. That decision, which occasioned the adoption of 8 C.F.R. 253.1(e) (see *Kordic*, *supra*, 386 F. 2d at 236), involved a crewman in respondent's situation who had received no hearing at all on his claim that he would be persecuted if he was returned to his homeland (188 F. Supp. at 494). The court held that a hearing is necessary, but did not suggest that the hearing must be before a special inquiry officer. Indeed, when *Szlajmer* was decided, in 1960, the initial determination whether relief under Section 243(h) should be granted was made by an official other than the special inquiry officer, even in ordinary expulsion proceedings. See note 35, *supra*.

APPENDIX

1. Sections 242(b), 243(h), 252, and 254 of the Immigration and Nationality Act, 66 Stat. 163 *ff.*, provide in pertinent part:

* * * * *

CHAPTER 5—DEPORTATION; ADJUSTMENT OF STATUS

* * * * *

APPREHENSION AND DEPORTATION OF ALIENS

SEC. 242 [8 U.S.C. 1252]. * * *

(b) A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation. * * * No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe. Such regulations shall include requirements that—

> (1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;

(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section. * * *

* * * * *

COUNTRIES TO WHICH ALIENS SHALL BE DEPORTED; COST OF DEPORTATION

SEC. 243 [8 U.S.C. 1253]. * * *

* * * * *

(h) The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason [1].

* * * * *

CHAPTER 6—SPECIAL PROVISIONS RELATING TO ALIEN CREWMEN

* * * * *

[1] As amended by the Act of October 3, 1965, Section 11(f), 79 Stat. 918. Prior to the amendment the phrase "persecution on account of race, religion, or political opinion" had read "physical persecution."

CONDITIONAL PERMITS TO LAND TEMPORARILY

SEC. 252 [8 U.S.C. 1282]. (a) No alien crewman shall be permitted to land temporarily in the United States except as provided in this section [and certain other sections, none of which are germane]. If an immigration officer finds upon examination that an alien crewman is a nonimmigrant under paragraph (15)(D) of section 101(a) [2] and is otherwise admissible and has agreed to accept such permit, he may, in his discretion, grant the crewman a conditional permit to land temporarily pursuant to regulations prescribed by the Attorney General, subject to revocation in subsequent proceedings as provided in subsection (b), and for a period of time, in any event, not to exceed—

(1) the period of time (not exceeding twenty-nine days) during which the vessel or aircraft on which he arrived remains in port, if the immigration officer is satisfied that the crewman intends to depart on the vessel or aircraft on which he arrived; or

(2) twenty-nine days, if the immigration officer is satisfied that the crewman intends to depart, within the period for which he is permitted to land, on a vessel or aircraft other than the one on which he arrived.

(b) Pursuant to regulations prescribed by the Attorney General, any immigration officer may, in his discretion, if he determines that an alien is not a bona fide crewman, or does not intend to depart on the

[2] *I.e.*, "an alien crewman serving in good faith as such in any capacity required for normal operation and service on board a vessel (other than a fishing vessel having its home port or an operating base in the United States) or aircraft, who intends to land temporarily and solely in pursuit of his calling as a crewman and to depart from the United States with the vessel or aircraft on which he arrived or some other vessel or aircraft" (Section 101(a)(15)(D), 8 U.S.C. 1101(a)(15)(D)).

vessel or aircraft which brought him, revoke the conditional permit to land which was granted such crewman under the provisions of subsection (a)(1), take such crewman into custody, and require the master or commanding officer of the vessel or aircraft on which the crewman arrived to receive and detain him on board such vessel or aircraft, if practicable, and such crewman shall be deported from the United States at the expense of the transportation line which brought him to the United States. Until such alien is so deported, any expenses of his detention shall be borne by such transportation company. Nothing in this section shall be construed to require the procedure prescribed in section 242 of this Act to cases falling within the provisions of this subsection.

* * * * * *

CONTROL OF ALIEN CREWMEN

SEC. 254 [8 U.S.C. 1284]. (a) The owner, agent, consignee, charterer, master, or commanding officer of any vessel or aircraft arriving in the United States from any place outside thereof who fails (1) to detain on board the vessel * * * any alien crewman employed thereon until an immigration officer has completely inspected such alien crewman, * * * or (2) to detain any alien crewman on board the vessel * * * after such inspection unless a conditional permit to land temporarily has been granted such alien crewman under section 252 [or certain other designated sections], or (3) to deport such alien crewman if required to do so by an immigration officer, whether such deportation requirement is imposed before or after the crewman is permitted to land temporarily * * *, shall pay to the collector of customs of the customs district in which the port of arrival is located or in which the failure to comply with the orders of the officer occurs

the sum of $1,000 for each alien crewman in respect of whom any such failure occurs. No such vessel or aircraft shall be granted clearance pending the determination of the liability to the payment of such fine, or while the fine remains unpaid, except that clearance may be granted prior to the determination of such question upon the deposit of a sum sufficient to cover such fine, or of a bond with sufficient surety to secure the payment thereof approved by the collector of customs. * * *

(b) Except as may be otherwise prescribed by regulations issued by the Attorney General, proof that an alien crewman did not appear upon the outgoing manifest of the vessel or aircraft on which he arrived in the United States from any place outside thereof, or that he was reported by the master or commanding officer of such vessel or aircraft as a deserter, shall be prima facie evidence of a failure to detain or deport such alien crewman.

(c) If the Attorney General finds that deportation of an alien crewman under this section on the vessel or aircraft on which he arrived is impracticable or impossible, or would cause undue hardship to such alien crewman, he may cause the alien crewman to be deported from the port of arrival or any other port on another vessel or aircraft of the same transportation line, unless the Attorney General finds this to be impracticable. All expenses incurred in connection with such deportation, including expenses incurred in transferring an alien crewman from one place in the United States to another under such conditions and safeguards as the Attorney General shall impose, shall be paid by the owner or owners of the vessel or aircraft on which the alien arrived in the United States. The vessel or aircraft on which the alien arrived shall not be granted clearance until such ex-

penses have been paid or their payment guaranteed to the satisfaction of the Attorney General. An alien crewman who is transferred within the United States in accordance with this subsection shall not be regarded as having been landed in the United States.

2. 8 C.F.R. 252.1 and 252.2 provide in pertinent part:

§ 252.1 *Examination of crewman.*

* * * * *

(d) *Authorization to land.* The immigration officer in his discretion may grant an alien crewman authorization to land temporarily in the United States for (1) shore leave purposes during the period of time the vessel or aircraft is in the port of arrival or other ports in the United States to which it proceeds directly without touching at a foreign port or place, not exceeding 29 days in the aggregate, if the immigration officer is satisfied that the crewman intends to depart on the vessel on which he arrived or on another aircraft of the same transportation line, and the crewman's passport is surrendered for safe keeping to the master of the arriving vessel, or (2) the purpose of departing from the United States as a crewman on a vessel other than the one on which he arrived, or departing as a passenger by means of other transportation, within a period of 29 days, if the immigration officer is satisfied that the crewman intends to depart in that manner, that definite arrangements for such departure have been made, and the immigration officer has consented to the pay off or discharge of the crewman from the vessel on which he arrived. A crewman granted a conditional permit to land under section 252(a)(1) of the Act and clause (1) of this paragraph is required to depart with his vessel from its port of arrival and from each other port in the United States to which it thereafter proceeds coastwise without touch-

ing at a foreign port or place; however, he may rejoin his vessel at another port in the United States before it touches at a foreign port or place if he has advance written permission from the master or agent to do so.

* * * * * *

§ 252.2 *Revocation of conditional landing permits; deportation.*

An alien permitted to land conditionally under § 252.1(d)(1) may, within the period of time for which he was permitted to land, be taken into custody by any immigration officer without a warrant of arrest and be transferred to the vessel upon which he arrived in the United States, if such vesel [*sic*] is in any port of the United States and has not been in a foreign port or place since the crewman was issued his condition [*sic*] landing permit, upon a determination by the immigration officer that the alien crewman is not a bona fide crewman or that he does not intend to depart on the vessel on which he arrived in the United States. The conditional landing permit of such an alien crewman shall be taken up and revoked by the immigration officer, and a notice on Form I–259 to detain and deport such alien crewman shall be served on the agent of the vessel, and if they are available, on the owner and the master or commanding officer of the vessel. Form I–99 shall be served on the crewman when he is taken into custody or as soon as practicable thereafter. On the written request of the master of the vessel, the crewman may be detained and deported, both at the expense of the transportation line on whose vessel he arrived in the United States, other than on the vessel on which he arrived in the United States, if detention or deportation on such latter vessel is impractical.

3. 8 C.F.R. 253.1(e) provided in pertinent part during the relevant period:[3]

§ 253.1 *Parole.*

* * * * * *

(e) *Crewman alleging persecution.* Any alien crewman denied a conditional landing permit or whose conditional landing permit issued under § 252.1(d)(1) of this chapter is revoked who alleges that he cannot return to a Communist, Communist-dominated, or Communist-occupied country because of fear of persecution in that country on account of race, religion, or political opinion may be paroled into the United States under the provisions of section 212(d)(5) of the Act for the period of time and under the conditions set by the district director having jurisdiction over the area where the alien crewman is located.

[3] 26 F.R. 11797 (December 8, 1961). Effective as of March 22, 1967, the pertinent paragraph was redesignated "(f)" and amended in an immaterial detail (32 F.R. 4341–4342).

U.S. GOVERNMENT PRINTING OFFICE: 1968